UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LINDA LORD,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 01-82-B***
	)	
LARRY G. MASSANARI,	***)***	
Acting Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that, with the effects of alcohol abuse factored out, the plaintiff is capable of performing past relevant work as a flagger on a construction crew. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from the following severe impairments: alcohol-abuse disorder, depression and chronic cervical and lumbar strain, Finding 3,

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security Larry G. Massanari is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 20, 2001, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Record at 21; that her alcohol-abuse disorder met the criteria of one of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings") but that, excluding the effects of alcohol abuse, she had no impairments meeting or equaling the Listings, Finding 4, *id*. at 22; that her statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 5, *id*.; that, excluding the effects of alcohol abuse, she lacked the residual functional capacity to lift and carry more than twenty pounds occasionally or more than ten pounds regularly or to bend frequently, Finding 6, *id*.; that in her past relevant work as a flagger on a construction crew, she was not required to lift more than twenty pounds or to bend frequently, Finding 7, *id*.; that this past relevant work did not require the performance of work functions precluded by her medically determinable impairments, excluding the effects of alcohol abuse, Finding 8, *id*.; that her impairments, exclusive of the effects of substance abuse, did not prevent her from performing her past relevant work, Finding 9, *id*.; that alcohol abuse was a material factor contributing to a determination that the plaintiff was disabled, Finding 10, *id*.; and that she had not been under a disability at any time through the date of decision, Finding 11, *id*. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the commissioner must make findings of the plaintiff's residual functional capacity and the physical and mental demands of past work and determine whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* Rulings 1975-1982 ("SSR 82-62"), at 813.

The plaintiff complains that the administrative law judge (i) erred in determining that alcoholism was a contributing factor material to her disability and (ii) failed to consider the side effects of her medication. *See generally* Statement of Specific Errors ("Statement of Errors") (Docket No. 3). I disagree.

I. Discussion

A. Alcohol and Drug Abuse

On March 29, 1996 Congress enacted Pub. L. No. 104-121, eliminating drug or alcohol addiction as a basis for obtaining disability benefits. *See* Historical and Statutory Notes to 42 U.S.C. §§ 423, 1382c; *Jones v. Apfel*, 997 F. Supp. 1085, 1093 (N.D. Ind. 1997). Under the new provision, "An individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. §§ 423(d)(2)(C), 1382c(a)(3)(J).

Applicable Social Security regulations provide that:

> (1) The key factor we will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol.
>
> (2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination, would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.
>
> (i) If we determine that your remaining limitations would not be disabling, we will find that your drug addiction or alcoholism is a contributing factor material to the determination of disability.
>
> (ii) If we determine that your remaining limitations are disabling, you are disabled independent of your drug addiction or alcoholism and we will find that your drug addiction or alcoholism is not a contributing factor material to the determination of disability.

20 C.F.R. §§ 404.1535(b), 416.935(b). A claimant bears the burden of proving that drug or alcohol addiction is not a contributing factor material to her disability. *Brown v. Apfel*, 192 F.3d 492, 498 (5th Cir. 1999); *accord Mittlestedt v. Apfel*, 204 F.3d 847, 852 (8th Cir. 2000).

The plaintiff complains that (i) the administrative law judge wrongly focused on whether she continued to use alcohol, rather than on whether the consumption of alcohol was a material factor contributing to her disability, (ii) in any event, a March 23, 1999 note of treating physician John W. Peterson, M.D., did not indicate that she was abusing alcohol at that time, and (iii) Dr. Peterson's report did not support a finding that her drinking was material to her disability. Statement of Errors at 2-3. In a related vein, the plaintiff's counsel contended at oral argument that the administrative law judge improperly went "beyond" analysis of whether alcoholism was material to the plaintiff's disability, finding that alcoholism caused the plaintiff's depression and side effects, a conclusion that in counsel's view was unsupported by the medical evidence of record.

I find each of these points unpersuasive for the following reasons:

1. The plaintiff misreads the decision of the administrative law judge, which appropriately addressed (in some detail) the extent to which, in the absence of alcohol abuse, the plaintiff would continue to suffer from emotional and physical impairments. Record at 18-21.

2. As the plaintiff herself points out, whether she did or did not continue to use alcohol at any particular point is immaterial (except to the extent it might shed light on her ability to function in the absence of alcohol abuse).

3. Dr. Peterson's letter of March 3, 1999 and note of March 23, 1999 shed no light on whether the plaintiff's alcoholism was or was not a contributing factor material to her disability – a subject Dr. Peterson did not purport to address. *See id*. at 326-28. However, there is substantial evidence elsewhere of record that her substance abuse was in fact material. *See, e.g., id*. at 166 (Psychiatric Review Technique Form ("PRTF") finding of Ake Akerberg, M.D., that the plaintiff's "longstanding alcohol abuse and dependence is severe and material. Her dysthymia is not severe."), 172 (comment in Physical Residual Functional Capacity Assessment of Robert Hayes, D.O., that "chronic alcohol use impairs claimant's perception of objective limitations"), 226 (April 11, 1995 note of Catherine Hawthorne, M.D., that "if anything is to be accomplished with this patient, there has to be a significant intervention in the form of an in-patient hospitalization, at a pain center, at which time one could intervene with respect to her drug, nicotene [sic], and alcohol addictions, and institute an aggressive physical therapy conditioning program and ultimately a work hardening program. . . . I suspect that at the completion of the program she would be able to function with little difficulty.").

4. There is nothing improper, *per se*, in analyzing whether alcoholism "causes" a certain condition or side effect, which seems to me merely a different way of approaching the question whether alcoholism is a material factor contributing to disability. In any event, the administrative law judge did not find that alcoholism had "caused" the plaintiff's depression and side effects. With

respect to depression, he found, "The evidence indicates that if the claimant were to stop using alcohol, whatever residual depressive symptoms remained would be controlled with medication." *Id.* at 19. With respect to side effects, he determined, "The evidence does not establish that the claimant would continue to suffer significant adverse side effects from prescribed medications were she to abstain completely from alcohol and take only the recommended dosage of such medications." *Id*. at 20-21. The first finding (concerning depression) is buttressed not only by the PRTF of Dr. Akerberg but also (as noted by the administrative law judge, *id*. at 18-19) by records from the Bangor Mental Health Institute indicating that, after the plaintiff was hospitalized following an alcohol-related 1995 suicide attempt her depressive symptoms began to lessen, *id*. 248, 252, and by a self-report by the plaintiff to Dr. Hawthorne that Prozac was effective in reducing her depression, *id*. at 225. The second finding (concerning side effects) is likewise supported by substantial evidence of record for reasons discussed below.

B. Medication Side Effects

The plaintiff finally asserts that the administrative law judge, in contravention of SSR 82-62 and *Figueroa v. Secretary of Health, Educ. & Welfare*, 585 F.2d 551 (1st Cir. 1978), failed to explore the impact that the side effects of her medication would have on her ability to work, offering no explanation for "how a person who is in some degree of pain and takes medication that causes sedation and fatigue would be able to stand on a highway holding a sign close to traffic on a sustained basis." Statement of Errors at 4.

As the administrative law judge noted, Dr. Peterson observed in March 1999 that the plaintiff's medications "could be causing some side effects which would include, fatigue and sedation." Record at 20, 326. However, the administrative law judge found that the evidence did not

establish that, were the plaintiff to abstain from alcohol and take only the recommended dosages of her pain medications, she would continue to suffer any significant adverse side effects. *Id*. at 20-21.

While the record does not compel such a conclusion, it supports it. First, as alluded to by the administrative law judge, *id*. at 20, Dr. Peterson qualified his report of side effects, hinting in his March 3, 1999 letter that at least some of the problem derived from overdosage and/or from interaction with alcohol:

> She takes multiple medications to help with this [neck and back pain] problem and these include; Darvocet N 100 and this could definitely cause some sedation and attempts have been made to try to keep this at as a [sic] low a dose as possible, but she has insisted that this is one medication that helps with her pain and discomfort and have tried to maintain her at doses of 2-3 times a day, although, she seems to consistently take it three times a day. Other medications include, Prozac 30 mg. once a day for anxiety and depression. She takes Amitriptyline 50 mg. at bedtime to help with sleep related issues and anxiety. She has been on Xanax for many years through Dr. Larson and this originally was at a dose of 0.5 mg three times a day and has slowly been tapered to 0.125 mg. three times a day and we are slowly trying to taper her off from this medication, this medication along with the Amitriptyline and Prozac could be causing some side effects which would include, fatigue and sedation. She has been working on some alcohol related issues which also impact on the anti-depressants and her sedative/hypnotic medication Xanax and we have discussed this at some length. She is currently receiving counseling in this area regarding these matters. . . . It is hoped that in the future some of these medications will be tapered or substituted . . . and since following her some of these have been able to be reduced, but I suspect they still impact on her complaints regarding fatigue and sedation.

Id. at 326-27.

Further, as the administrative law judge also found, *id*. at 20, there was some evidence of record that the plaintiff had taken more than the recommended dosage of prescription medications, *id.* at 330 (December 8, 1998 note of Dr. Peterson that "we discussed the use of Darvocet which apparently is occasionally 4-5 times a day and I have encouraged her to take this only three times a day" and handwritten note of December 17, 1998 that "Paul at Rite Aid called. [The plaintiff] tried to fill Darvocet early. Had the refill Date changed by [sic] and on Bottle. Also Paul stated script had been filled at another pharmacy.").

As counsel for the plaintiff pointed out at oral argument, Dr. Peterson's March 1999 letter does not flatly state that, absent the effects of alcohol, the plaintiff would have no medication side effects. However, the letter makes clear that the plaintiff's side effects are exacerbated, to some unquantified degree, by both alcohol consumption and overdosage. Given that the plaintiff bore the burden of proving that the effects of alcoholism and drug abuse were not a material factor contributing to her disability, the administrative law judge did not err in finding that, with respect to side effects, the ambiguous Peterson letter failed to meet that burden.

In short, the administrative law judge considered and made a finding respecting the plaintiff's claimed side effects as required by *Figueroa*, 585 F.2d at 553-54, supportably discounting them as substance-abuse related, on the basis of which he excluded them from his SSR 82-62 analysis of residual functional capacity for past relevant work.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of November, 2001.

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David M. Cohen
United States Magistrate Judge